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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 664

RICHARD M. CORNWELL, ET AL.,
Petitioners,

v.

STATE BOARD OF EDUCATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Warren E. Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Richard M. Cornwell, et al., for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Appeals and District Court have not yet been published, but will be found in the Appendix. The opinion of the Court of Appeals at p. 1a. The opinion of the District Court at p. 3a.

JURISDICTION

The judgment of the Court of Appeals was made and entered on June 9, 1970, and a copy thereof is appended to this petition in the Appendix at p. 2a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In an action arising under the First Amendment to the Constitution of the United States, the due process clause of the Fourteenth Amendment, and the equal protection clause of the Fourteenth Amendment, petitioners sought injunctive relief from the United States District Court for the District of Maryland to restrain the respondents from teaching, initiating or enforcing sub-section 4 of By-Law 720:3 of the Maryland State Board of Education, relating to a program of sex education. The District Court dismissed the petitioners' complaint on the ground that the federal question raised was insubstantial. The Court of Appeals affirmed, adopting the reasons stated by the District Court as the basis for its decision.

Questions Presented are:

1. Was the District Court required to convene a Three-Judge Court to try the case?

2. Was petitioners' constitutional challenge founded on allegations, in the complaint wholly, insubstantial and frivolous?

3. Was the District Court, having decided several substantial questions raised by petitioners' complaint, justified in then dismissing the complaint on the ground that the federal question raised was insubstantial?

CONSTITUTIONAL PROVISIONS AND REGULATIONS

The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

The Fourteenth Amendment provides: "1. All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Resolution of the Maryland State Board of Education adopting By-Law 720:3 is set out in the Appendix, p. 10a.

STATEMENT OF THE CASE

The respondent, Maryland State Board of Education, by resolution dated July 26, 1967 (Appendix, p. 10a), adopted By-Law 720:3. Pursuant to the directives of the State Board of Education following adoption of said By-Law, family, social and sex entitled programs were initiated in the Baltimore County Public School System through the agency of the Baltimore County Board of Education.

Petitioners sought to enjoin the teaching of sex education in the Baltimore County Public Schools on the grounds that the program adopted pursuant to By-Law 720:3 infringed upon and denied the petitioners' free exercise of their religious concepts and that the program in question

has established religious concepts by the theories it is based upon, all in contravention of the proscriptions of the First Amendment to the Constitution of the United States applied to State action by the Fourteenth Amendment.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The decision of the District Court, affirmed by the Court of Appeals by adoption of the reasons stated by the District Court for its decision, denied elementary justice to the plaintiffs in that the District Court, in effect, tried the case and decided many substantial questions going to the merits of the case, without allowing the plaintiffs to present evidence or arguments pertinent to the questions decided.

The District Court decided:

1. That the By-Law in question was not an unreasonable exercise of the authority vested in the State Board of Education to determine a teaching curriculum;
2. That the By-Law in question does not deny equal protection of the laws;
3. That the plaintiffs have no exclusive right to instruct their children in sexual matters (though the plaintiffs claimed an *inalienable*, not an *exclusive*, right to so instruct their children);
4. That the By-Law in question does not establish a particular religious dogma or precept;
5. That the By-Law in question does not deny to the plaintiffs' the free exercise of their religious concepts.

All the above questions, especially in view of the fact that plaintiffs challenged not only the By-Law but the

particular program adopted in pursuance thereof, are substantial questions which cannot properly be decided without evidence and legal arguments being presented to the court. Yet plaintiffs were denied the opportunity to present evidence and argue on the basis of it, since the case was dismissed on motion.

It was wholly inconsistent for the District Court to have found the above questions raised by the plaintiffs' complaint, to have decided them, thus assuming jurisdiction of the case, and then to have granted the motion to dismiss on the ground that "the federal question here is plainly insubstantial."

The District Court thus held that as a matter of law, *no* sex education program could possibly infringe upon the plaintiffs' rights, that *by definition* a sex education program cannot be violative of rights of parents. But plaintiffs sought to prove that the *particular* sex education course in question was an infringement upon their rights and were denied a day in court. The District Court, for example, had no knowledge that the program in question does not inferentially, or even explicitly, deny fundamental teachings of the Judaeo-Christian moral tradition, and thus undermine, perhaps destroy, the authority of parents seeking to train their children to live according to those precepts; for it refused to hear anything whatever of the content of the program challenged, by its dismissal of the case on motion.

The effect of the action of the District Court was that the plaintiffs were denied the most elementary right of litigants under Anglo-Saxon jurisprudence, the right to be heard in court. Since the rights of litigants have always been of the greatest concern to this Court, the present case is peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

Wherefore, Richard M. Cornwell, et al., petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals in the above entitled case.

EDWARD C. MACKIE,

Counsel for Petitioners.

OPINION OF COURT OF APPEALS

United States Court of Appeals
For The Fourth Circuit

No. 13,976

Richard M. Cornwell, et al.,
Appellants,

versus

State Board of Education, et al.,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

(Argued June 4, 1970 Decided June 9, 1970)

Before SOBELOFF, CRAVEN, and BUTZNER, Circuit Judges.

Edward C. Mackie and Warren K. Rich (Rollins, Smalkin, Weston & Andrew on brief) for appellants; Malcolm R. Kitt, Special Assistant Attorney General of Maryland (Francis B. Burch, Attorney General of Maryland and Martin B. Greenfeld, Assistant Attorney General of Maryland, on brief) for appellees.

PER CURIAM:

Parents of pupils attending Baltimore County, Maryland, schools seek to enjoin the State Board of Education from implementing the board's bylaw 720:3, which provides in part:

> "It is the responsibility of the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students as an integral part of the curriculum including a planned and sequential program of health education."

The board adopted the bylaw as an appropriate measure for health and education after it studied the problem of pregnant students. The plaintiffs allege the bylaw violates the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

The district court, construing the allegations in the light most favorable to the plaintiffs, held that the constitutional challenge lacks merit. We agree, and, for the reasons stated by the district court, we affirm its dismissal of the action.

AFFIRMED.

JUDGMENT

(Filed June 9, 1970)

United States Court of Appeals
For The Fourth Circuit

No. 13,976

Richard M. Cornwell, et al.,

Appellants,

v.

State Board of Education, et al.,

Appellees.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SAMUEL W. PHILLIPS,
Clerk.

A True Copy Teste:

SAMUEL W. PHILLIPS,
Clerk.

By MARGARET M. WALTON,
Deputy Clerk.

ORAL OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND COURT

(Filed August 22, 1969)

In this civil action, Baltimore County taxpayers are suing the Maryland State Board of Education seeking to prevent the implementation in the Baltimore County Schools of a program of sex education. In particular, the plaintiffs, who are school children and their parents, seek to have this Court declare unconstitutional a by-law duly adopted by the State Board. The provision in question is By-Law 720, Section 3, Subsection 4, which provides as follows:

> "It is the responsibility of the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students as an integral part of the curriculum including a planned and sequential program of health education."

The plaintiffs ask for the following relief (this is from paragraph 14 of the complaint, the "wherefore" clause, and I will only read parts of that):

> "Wherefore plaintiffs demand judgment that the defendants * * * be perpetually and permanently enjoined and restrained from promulgating, teaching, initiating or enforcing any of the tenets found within Sub-section 4 of By-Law 720:3 as they pertain to non-pregnant children, as such By-Law was enacted in July, 1967; (3) and plaintiffs further pray for a preliminary injunction. * * * and * * * other * * * relief."

The plaintiffs claim that jurisdiction exists here because the by-law in question violates the First Amendment, the equal-protection clause of the Fourteenth Amendment and the due-process clause of the Fourteenth Amendment.

At the outset, it should be noted that the plaintiffs have not requested in this complaint the covening of a three-judge court. However, it would appear that this is a proper case for such a court. See 28 U.S.C., Section 2281; also *American Federation of Labor v. Watson*, 327 U.S. 582, 592, quoting from *Phillips v. United States*, 312 U.S. 246 at 251.

However, the mere fact that plaintiffs have not requested a three-judge court does not mean that the action is subject to summary dismissal. In this connection see the case of *Aaron v. Cooper*, 261 F. 2d 97, 105 (8th Cir. 1958).

Therefore, this action will be treated as one in which a three-judge court was requested but with respect to which the suit has been referred to one judge to make the initial determination whether the suit is subject to dismissal.

It is clear that one judge may dismiss if he finds that a constitutional claim is so insubstantial that there is no jurisdiction. As the Supreme Court note in *Ex parte Poresky*, 290 U.S. 30 (1933) for jurisdiction to exist in a three judge

court case there must be a substantial question (4) of constitutionality. The Court further said the following:

(This is at page 32 of that opinion.)

> "The question may be plainly insubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject . . .'"

See also the Fourth Circuit decision of *Jacobs v. Tawes*, 250 F. 2d 611 and *Bailey v. Patterson*, a Supreme Court decision at 369 U.S. 31, 33, and a recent decision of Judge Kaufman in this Court, *Chester v. Kinnamon*, which is reported at 276 F. Supp. 717. Judge Kaufman decided that case on November the 14th, 1967, and at page 720 he said this:

> "Under 28 U.S.C., Sections 2281 and 2284, Subsection 1, this Court is required to ask the Chief Judge of the United States Circuit Court for the Fourth Circuit to convene a three-judge District Court *only* if there is a substantial non-frivolous attack upon the constitutionality of a Maryland statute but not otherwise."

In determining whether there is here a substantial question of constitutionality, this Court concludes initially that no question whatsoever arises under the Fourteenth Amendment. There is first no denial of substantive due process (5) to the plaintiffs. Under Section 6 of Article 77 of the Maryland Code (as amended and re-codified by Chapter 405 of the Acts of 1969), the State Board is directed to determine the educational policies of the state and to enact bylaws for the administration of the public school system, which when enacted and published shall have the force of law. Assuredly it cannot be said that the By-Law here is an arbitrary or unreasonable exercise of the authority vested in the State Board to determine a teaching curriculum, nor that there is no basis in fact for the legislative policy expressed in the By-Law. Furthermore, it does not appear that the By-Law denies equal

protection of the laws, as on its face it applies to all pupils equally.

Plaintiffs allege that the enactment of this By-Law was based on a study made in reference to pregnant pupils. But whatever the genesis of the By-Law, it is not the study that is being attacked here but the By-Law itself, and it is being attacked on its face. It is the provisions of the By-Law then that must be examined in the light of the United States Constitution. The plaintiffs' argument that the By-Law is defective because it applies to non-pregnant as well as to pregnant pupils is difficult to follow. There would appear to be just as much reason for the State Board to provide sex education for the non-pregnant (and, incidentally, for the non-impregnating) as for those students who, because of a lack of information on the subject (or for other reasons) have become pregnant or who have caused pregnancy.

(6) The plaintiffs further assert that they have the exclusive constitutional right to teach their children about sexual matters in their own homes, and that such exclusive right would prohibit the teaching of sex in the schools. No authority is cited in support of this novel proposition, and this court knows of no such consitutional right.

This Court, then, is satisfied that the claims asserted in this complaint under the Fourteenth Amendment are so insubstantial that they do not confer jurisdiction here.

In support of their First Amendment claim, the plaintiffs assert that they have been denied the free exercise of their religious concepts and that the teaching of sex in the Baltimore County Schools will in fact establish religious concepts.

In *Everson v. Board of Education*, 330 U.S. 1, a decision of the Supreme Court in 1947, the Supreme Court said that the Establishment Clause meant the following (this is at pages 15 and 16):

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one

religion, aid all religions, or prefer one religion over another."

In the more recent case of *School District v. Schempp*, 374 U.S. 203, the Supreme Court said that the actual study of the Bible and of religion, "when presented objectively (7) as part of a secular program of education" would not offend the Establishment Clause. And, further along in that case, at page 222, the Court formulated a basic test for determining the validity of a legislative provision under the Establishment Clause of the First Amendment as follows:

> "What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribd by the Constitution."

It is clear from the cases that the First Amendment does not say that in every and all respects there shall be a separation of church and state. See *Zorach v. Clauson*, 343 U.S. 306, 312. As Mr. Justice Brennan said, concurring in the *Schempp* case, the Framers meant only to foreclose "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."

Now, here it is helpful to look at those cases in which the Supreme Court has found an establishment of religion in violation of the First Amendment. I would note *Engel v. Vitale*, 370 U.S. 421, where official prayers to be recited (8) in the classroom were held unconstitutional. I would further note *Chamberlin v. Dade County Board of Public Instruction*, 377 U.S. 402 and the *Schempp* case to which I have previously referred, where devotional Bible reading and recitation of the Lord's Prayer were held to be in violation of the First Amendment. I would note *McCollum v. Board of Education*, 333 U.S. 203, where the employ-

ment of teachers by private religious groups to give religious instruction in the schools to those children whose parents desired it was held to be proscribed.

On the other hand, where such overt religious activities have been absent, the Supreme Court has upheld governmental programs even though they had some religious connection. Here I would refer to the *Everson* case, where the reimbursement of parents for transportation expenses to parochial schools was upheld; and *Zorach v. Clauson*, which I previously referred to, where a released-time program allowing students to attend religious instruction centers off school grounds during the school day was upheld; and *Board of Education v. Allen*, 392 U.S. 236, where the loan by the state of textbooks to students in parochial schools was also upheld.

A very recent and pertinent decision of the Supreme Court is the *Epperson* case, *Epperson v. Arkansas*, 393 U.S. 97, a 1968 decision. There the Arkansas anti-evolution statute was under challenge. That act made it a criminal offense to teach the theory that man evolved from a lower (9) form of animal life. The Supreme Court found the act to be an unconstitutional violation of the Establishment and Free Exercise Clauses and held that a state may not proscribe the teaching of a particular segment of knowledge solely because it conflicts with a particular doctrine of a particular religious group. In that case, the Court said this at page 104:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Now, the Court further asserted in that case that the state may neither prefer any religion nor prohibit any theory just because it be deemed antagonistic to the prin-

ciples or prohibitions of any religious sect or dogma. The Court quoted in the *Epperson* case from *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505, as follows:

> "The state has no legitimate interest in protecting any or all religions from views distasteful to them."

(10) Rather, the test is that enumerated in the *Schempp* case, which I have previously referred to, namely, what is the purpose and the primary effect of the enactment. And I would interpolate in the quotation from the *Burstyn* case to say that this Court likewise has no legitimate interest in protecting any or all religions from views distasteful to them.

Now, applying these principles that have been established by these various cases, it is quite clear to this Court that the purpose and primary effect of the By-Law here is not to establish any particular religious dogma or precept and does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion. The By-Law may be considered quite simply as a public health measure. As the Supreme Court indicated in *Prince v. Massachusetts*, 321 U.S. 158, the State's interest in the health of its children outweighs claims based upon religious freedom and the right of parental control. The Court in that particular case said this:

> "A democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child (11) or one that religious scruples dictate contrary action."

In summary, then, the Court concludes that the federal question here is plainly insubstantial. Construing the allegations in a light most favorable to the plaintiffs, as the Court must do on these motions to dismiss, this Court finds that the constitutional questions relied upon are obviously without merit. The unsoundness and insubstanti-

ality of the plaintiffs' position is clearly indicated by the various decisions of the Supreme Court to which I have alluded.

For these reasons, then, the two motions to dismiss are granted.

Now, perhaps I can instruct the Clerk to insert a legend on the margin of each of these motions to the effect that after hearing argument the motions to dismiss are granted for the reasons stated in the oral opinion of the Court.

ALEXANDER HARVEY, II.

RESOLUTION

Maryland State Board of Education

July 26, 1967

Resolution No. 1967-43

Re: Bylaw 720:3 Educational Programs for Pregnant Girls

WHEREAS, The State Board of Education appointed a Committee to study the provision of appropriate school programs and attendance for pregnant girls; and

WHEREAS, The Committee consulted with representatives of the State Departments of Health and Welfare, the Medical and Chirurgical Faculty of Maryland, and the Advisory Council on Child Welfare; and

WHEREAS, As a result of this consultation certain recommendations were agreed upon; now, therefore, be it

RESOLVED, That the State Board of Education adopts Bylaw 720:3 to read as follows:

Bylaw 720:3 Educational Programs for Pregnant Girls

It is the State's responsibility to provide appropriate school programs for all students including pregnant girls, married or unmarried. Such programs shall be

approved by the State Superintendent of Schools and shall include provision for counseling, social work and psychological services as needed.

1. A girl who is pregnant, either married or unmarried, who has not completed her high school education may elect to remain in the regular school program and shall not be *involuntarily* excluded from any part of this program.

   The decision to modify this program shall be reached by appropriate educational, medical and paramedical personnel in joint consultation with the girl concerned.

2. A girl who is pregnant, either married or unmarried, who is under compulsory school age, may *voluntarily* withdraw from the regular school program provided that she enrolls in an appropriate educational program planned for her.

   The decision concerning an appropriate educational program for the pregnant girl shall be reached in joint consultation with the girl, her parents and or husband, appropriate school personnel and her physician.

   Appropriate school programs may be:

   a. continuation of the regular school program (modified in terms of indivdiual needs)
   b. enrollment in a special school or special class for pregnant girls
   c. enrollment in a residential school (may be regional)
   d. telephone teaching
   e. T.V. teaching
   f. home teaching
   g. programmed instruction
   h. admittance to a private maternity home
   i. combination of the above programs

3. It is the responsibility of the local school system working with the home to cooperate with other state, county, and city agencies, such as health, welfare, and juvenile services and with private physicians or agencies to assure that the pregnant girl receives proper medical, psychological and social services prior to termination of pregnancy and for as long as needed thereafter.

4. It is the responsibility of the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students as an integral part of the curriculum including a planned and sequential program of health education.

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW
JURISDICTION
QUESTIONS PRESENTED
CONSTITUTIONAL PROVISION AND REGULATION

The Respondent adopts these statements as set forth in Petitioners' Brief.

STATEMENT OF THE CASE

The Respondent, Maryland State Board of Education, by resolution dated July 26, 1967 (Petition, p. 10a), adopted

By-Law 720:3. Pursuant to the directives of the State Board of Education following adoption of said By-Law, family, social and sex entitled programs were initiated in the Baltimore County Public School System through the agency of the Baltimore County Board of Education. On May 29, 1969 Petitioners, taxpayer parents who reside in Baltimore County, Maryland and their children who attend the public schools in Baltimore County, filed a complaint in the United States District Court for the District of Maryland seeking to enjoin the teaching of sex education in the Baltimore County Public Schools on the grounds that the program adopted pursuant to By-Law 720:3 infringed upon and denied the Petitioners' free exercise of their religious concepts and that the program in question has established religious concepts by the theories it is based upon, all in contravention of the proscriptions of the First Amendment to the Constitution of the United States applied to State action by the Fourteenth Amendment. On August 2, 1970 the Board of Education of Baltimore County filed a Motion to Dismiss the Complaint on the grounds that the complaint failed to state a cause of action and for lack of federal question jurisdiction.

On August 6, 1969 the State Board of Education filed a Motion to Dismiss the Complaint on the grounds that the complaint failed to state a cause of action and for lack of federal question jurisdiction.

On August 22, 1969 a hearing was held before Judge Alexander Harvey, II, at which time Judge Harvey granted the motions of defendants to dismiss the complaint. (See Petition 3a.) Petitioners appealed the ruling of the District Court to the United States Court of Appeals for the Fourth Circuit and the appeal was argued on June 4, 1970. On June 9, 1970 the United States Court of Appeals for the

Fourth Circuit in a per curiam opinion affirmed the decision of the District Court. (See Petition 1a.)

ARGUMENT

THE DISTRICT COURT WAS NOT REQUIRED TO CONVENE A THREE-JUDGE COURT SINCE PETITIONERS' CONSTITUTIONAL CLAIMS ARE FRIVOLOUS AND INSUBSTANTIAL.

The District Judge refused to set in motion the procedures for the convening of a three-judge court under 28 U.S.C., Sections 2281, et seq. but granted the Respondents' Motions to Dismiss on the ground that the Petitioners' constitutional claims were frivolous and insubstantial. In so doing, the District Judge relied on *Ex Parte Poresky*, 290 U.S. 30 (1963) among other cases. (Petition 4a, 5a.)

Ex Parte Poresky, supra, 290 U.S. at p. 32, stated as follows:

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. . . . The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy'. . . ."

The *Poresky* doctrine was not modified in any manner by the 1942 Congressional amendments as clearly evidenced by the Supreme Court's holding in 1965 in *Swift & Co. v. Wickham*, 382 U.S. 111, 114-115, where *Poresky* was again cited and reaffirmed as follows:

> ". . . The threshold question before us, the consideration of which we postponed to the merits (379 U.S. 997, 13 L. ed. 2d 700, 85 S. Ct. 716) is whether this Court, rather than the Court of Appeals, has jurisdic-